United Nations A/69/273

General Assembly

Distr.: General
7 August 2014

Original: English

Sixty-ninth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, submitted pursuant to Human Rights Council resolution 25/16.

* A/69/150.

14-58891 (E) 260814

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Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Summary

The present report sets out the preliminary workplan of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, for the period 2014-2017.

The Independent Expert would like to focus on six thematic areas: (a) preventive aspects of fiscal policy and debt management to avoid potential negative human rights implications of borrowing; (b) international human rights law in the context of debt restructuring and debt relief; (c) good practices to avoid negative human rights implications in the context of debt crisis and economic adjustment programmes; (d) human rights and debt arbitration in the context of bilateral investment treaties; (e) lending to States and non-State actors involved in gross human rights violations and transitional justice; (f) impact of illicit financial flows on human rights.

The Independent Expert would like to engage actively in international forums and enhance his engagement with States, including the Group of 20 and the Group of 77, international financial institutions, the Paris Club, United Nations entities and other international organizations, civil society organizations, the private sector and academia. He also intends to play an active role in the implementation of the post-2015 development agenda and related events. Country visits will be aimed at identifying good practices and assisting Governments in implementing internationally agreed (sustainable) development goals or in pursuing debt or adjustment policies informed by human rights law. The Independent Expert will also provide advice and, if needed, undertake advocacy and raise concerns through established working methods of special procedures. Throughout his work, he will continue to pay attention to the particular impact of policies at the international, national and local levels on women, children, persons with disabilities, indigenous people, migrants, minorities and other groups. The Independent Expert will craft his advice and policy recommendations on the basis of not only the obligations and guidance provided by international human rights law but also solid empirical evidence, which demonstrates that putting human rights at the heart of development and financial policies will frequently lead to better and more sustainable results.

I. Introduction

1. The present report sets out the preliminary workplan of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, for the period from 2014 to 2017. On 8 May 2014, Juan Pablo Bohoslavsky was appointed by the Human Rights Council as the new Independent Expert on the effects of foreign debt; he assumed office on 2 June 2014. His report is submitted pursuant to Council resolution 25/16, in which the Council requested him to report regularly to the Council and the General Assembly.

2. The report is structured as follows: first, it provides a short background on the history of the mandate followed by a brief overview of the informal consultations that the Independent Expert held in New York and Washington, D.C., from 7 to 11 July 2014. It then outlines six thematic priorities that the Independent Expert would like to study further during his first three years. They include: (a) preventive aspects of debt policy and debt management to avoid potential negative human rights implications of borrowing; (b) international human rights law in the context of debt restructuring and debt relief; (c) good practices to avoid negative human rights implications in the context of debt crisis and economic adjustment programmes; (d) human rights and debt arbitration in the context of bilateral investment treaties; (e) lending to States involved in gross human rights violations and transitional justice; and (f) impact of illicit financial flows on human rights.

3. The last section outlines the methodological approach that the new Independent Expert will follow while implementing his mandate. This includes participation in international debates on debt relief, debt restructuring, financing for development, and illicit financial flows. In this context, he intends to attend key events, in particular those related to the further development and implementation of the United Nations post-2015 development agenda. He would like to enhance dialogue and engagement with States, international financial institutions, United Nations agencies and other international organizations, the private sector, civil society and academia. Country visits will be essential to identifying good practices, assisting Governments in implementing internationally agreed (sustainable) development goals, learning from national and local experiences and identifying human rights challenges that States face while pursuing debt or adjustment policies. The Independent Expert will need to provide advice, undertake advocacy and raise concerns through established working methods of special procedures, including communications and public statements, and continue to pay attention to the particular impact of debt and structural adjustment policies at the international, national and local levels on women, children, persons with disabilities, indigenous people, migrants, minorities and other groups. He will base his advice and policy recommendations on the obligations and policy guidance that international human rights law provides. His intention is not only to remind States and other stakeholders about their human rights obligations or responsibilities but also to provide advice to them when they are required to take difficult decisions in challenging circumstances. His research and advice will therefore focus on good practice and solid empirical evidence.

II. Background of the mandate

4. The mandate of the Independent Expert was established in 2000, when two special procedures mandates of the Commission on Human Rights covering the effects of foreign debt and structural adjustment policies were merged. Since then, the mandate has been adjusted and the mandate holder requested to cover additional issues. Previous mandate holders include Fantu Cheru (Independent Expert on structural adjustment policies, 1998-2001), Reinaldo Figueredo (Special Rapporteur on the effects of foreign debt on the full enjoyment of economic, social and cultural rights, 1998-2000), Bernards Mudho (2001-2008) and Cephas Lumina (2008-2014).

5. After a comprehensive consultative process with States, academic experts and civil society representatives, the previous mandate holder, Cephas Lumina, presented the Guiding Principles on foreign debt and human rights (A/HRC/20/23, annex) to the Human Rights Council in June 2012. The Guiding Principles were endorsed by the Council on 5 July 2012 in resolution 20/10. The previous mandate holder contributed to the clarification of many important issues, including the topic of vulture funds and human rights (A/HRC/14/21), international trade, debt and human rights (see A/65/260 and Corr.1), export credit agencies and human rights (see A/66/271) and the impact of foreign debt and related policies on women's rights (see A/67/304). He also presented an interim and a final study on the impact of non-repatriation of illicit funds on the enjoyment of human rights (A/HRC/22/42 and A/HRC/25/52, respectively) to the Council. His most recent thematic reports include an assessment of the human rights impact of international debt relief initiatives (A/HRC/23/37) and a report which focused on the lessons learned from the implementation of Goal 8 of the Millennium Development Goals, global partnership for development (see A/68/542).

6. The mandate of the Independent Expert was extended on 27 March 2014 by the Human Rights Council in its resolution 25/16 for a period of three years. The Independent Expert reports every year to the Council (in March) and to the General Assembly (in October).

7. In addition, in its resolution 25/9, the Human Rights Council requested the Independent Expert to continue to consider the impact of illicit financial flows on the enjoyment of human rights as part of the mandate. The Council also requested the Independent Expert to undertake a further analysis of the negative impact of illicit financial flows in the context of the post-2015 development agenda and to present an interim report on the topic to the Council in March 2015 and a final study after one year.

III. Informal consultations on the workplan

8. The Independent Expert made available a draft version of the workplan on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and invited States, international financial institutions, international organizations, the private sector, civil society organizations and academic experts to provide comments. In this context, he would like to share his appreciation for the written submissions received from the Asia Pacific Forum on Women, Law and Development, the Center for Economic and Social Rights, the Center for Women's Global Leadership at Rutgers University, Global Financial Integrity, the

International Commission of Jurists, the European Network on Debt and Development (Eurodad, on behalf of 12 civil society organizations) and several academic experts from Africa, Asia, Europe, Latin America and the United States of America.

9. He held a series of informal consultations with State representatives, international financial institutions and civil society representatives in New York and Washington, D.C., from 8 to 11 July 2014. In addition, he participated in an expert group meeting held in New York on 7 July 2014 by the United Nations Conference on Trade and Development (UNCTAD). The meeting was held in the context of the UNCTAD initiative aimed at elaborating and proposing to the international community a concrete debt workout mechanism.

10. His interlocutors in New York and Washington, D.C., included representatives from several States and officials from the European Union, the International Monetary Fund, the World Bank and the Inter-American Development Bank. He also met the Coordinator of the Stolen Assets Recovery Initiative, a joint initiative of the World Bank and the United Nations Office on Drugs and Crime; the Executive Managing Director of the Institute of International Finance; the President of Global Financial Integrity; a member of the Advisory Board of the Business and Society Programme of the Aspen Institute; and representatives of the Center for Economic and Social Rights, the Center of Concern and Jubilee USA Network. The Independent Expert engaged in a very fruitful exchange with the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the former's work programme. He would like to extend his sincere thanks to all his interlocutors for taking the time to meet with him and provide valuable feedback on his draft workplan. While not all comments have been incorporated in the present report, many of them will be very useful as the Independent Expert explores the thematic issues outlined below in more detail.

IV. Thematic priorities for 2014 to 2017

11. While the six substantive themes are separated for the purposes of the present document, it is stressed that the mandate holder will highlight the linkages among them. As not all stakeholders may have found time to provide feedback during the few weeks since the Independent Expert assumed office, he is open to receiving further comments and suggestions. The workplan outlined below may therefore be further adjusted. In addition, some flexibility in implementing the workplan should remain, to ensure that the mandate holder can respond adequately to new developments that will require his attention. Finally, the full realization of the work programme may depend on whether the mandate holder receives support in addition to the core funding provided through the regular budget of the United Nations.

A. Preventive aspects of fiscal policies and debt management

12. Sovereign debt and human rights discourse may have preventive aspects in the context of debt crises which have remained largely unexplored by the academic, civil society, governmental and international communities. Debt policies and debt management strategies designed and implemented by Governments and monitored by international financial institutions rarely take into consideration the human rights

implications of debt portfolios. The idea is not to wait until a debt crisis erupts, with potential negative impacts on the realization of economic, social and cultural rights, but to increase awareness that such impacts can frequently be avoided by improved fiscal policies and debt management.[1] Contributing to the enhancement of this preventive dimension of human rights law in sovereign financing constitutes a goal in itself. While ensuring the enjoyment of human rights sometimes requires resources, international human rights standards should inform the facilitation of responsible, effective and sustainable fiscal policies and management strategies. This includes the study of contemporary and prominent sovereign financing instruments, such as bond and derivate trading.

B. Human rights in the context of debt restructuring and debt relief

13. International law applicable to sovereign debt restructuring is still in its infant stage. Some international rules and principles are emerging and are being consolidated. As sovereign insolvency has obvious implications for the enjoyment of economic, social and cultural rights by debtors' populations and of their right to development, international human rights law should be considered when defining and identifying the rules governing debt restructurings. Standstill agreements, seniority, the distribution of financial losses between debtors and creditors and among creditors, the legitimacy of decision-making processes, holdout creditors' rights, and the procedural and substantive aspects of vulture funds litigation are concrete examples of problems and challenges posed by every debt restructuring, the rules relating to which should also be informed by international human rights law. Research will be encouraged in this realm, and the Independent Expert will undertake, when suitable, advocacy for a human rights-based approach to debt restructuring and debt relief.

C. Good practices in dealing with debt crisis

14. The mandate holder will continue to monitor how debt burdens and adjustment programmes affect the enjoyment of human rights. Such monitoring will be complemented with the exploration of more sophisticated tools informed by human rights law to give Governments and those severely affected by such programmes more effective means to prevent negative human rights impacts that may result from such policies, and, if required, receive compensation for them. Such tools may operate at both the domestic and international levels. In the same vein, it is necessary to identify best practices for decision-making in situations in which retrogressive measures cannot be avoided owing to necessity. Who is affected by policy reforms, how much and for how long? How can adjustment policies be implemented in a manner that human rights, including those of vulnerable or marginalized groups (including, but not limited to, children and women), are respected and that essential levels of economic, social and cultural rights remain guaranteed? These are all delicate questions that Governments have been seeking to answer with varying degrees of success from the human rights viewpoint. Lessons can be learned from these experiences.

[1] See also in this context the recent report on fiscal and taxation policies and human rights of the Special Rapporteur on extreme poverty and human rights (A/HRC/26/28).

15. The identification of applicable rights and appropriate remedies in the debt context will ensure that the claims of adversely affected groups can be considered alongside those of creditors and other stakeholders in formulating any debt restructuring or adjustment programme.

D. Debt disputes and bilateral investment treaties

16. International investment arbitration is increasingly used to solve disputes between sovereign debtors and their creditors despite the legal gaps and inconsistencies in foreign investment law and institutional weaknesses in the international arbitration system. Nevertheless, given that its application to debt disputes is ultimately a policy choice of the parties to the treaties, and as cases are actually proceeding, it would be useful to explore whether international human rights law has, and should have, a role in this area when dealing with sovereign debt disputes while monitoring the evolution of those arbitration cases. [2] Creditors' property rights, States' responsibilities and the fundamental rights of debtors' populations need to be fairly balanced in every debt dispute forum while adequately dealing with the collective action problems that debt distress brings.

E. Lending to States and non-State actors engaged in gross human rights violations

17. While acknowledging the seminal work on sovereign debt and human rights carried out in 1978 by Antonio Cassese for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (E/CN.4/Sub.2/412 (vols. I-IV) and Corr.1), the Independent Expert is of the view that more work is needed to better understand whether, and how, to prevent and minimize the risk that private and official financial assistance may be provided to Governments and non-State actors committing gross human rights violations. This work could include quantitative and qualitative academic research on the link between debt and human rights violations, and country studies and recommendations on the use of financial instruments to prevent, halt or minimize gross human rights violations, as well as access to justice in this regard.

18. Transition to peace poses a great political, legal, economic and institutional challenge in terms of holding State and non-State actors accountable for their roles during conflict periods. In those cases in which lenders and other economic actors may have financially contributed to the success of Governments that grossly violated human rights, transitional justice mechanisms may be adopted and/or adapted to incorporate those financial actors into the quest for truth, justice, memory, reparation and non-repetition. In addition, as there are bound to be arguments for a clean slate after internal conflicts, it is worth tracking and useful to identify best practices or emerging custom in this respect. Contributing to both conceptual discussions and advice to countries going through transitional periods is among the challenges for this mandate.

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[2] In this context the Special Rapporteur on the right to food presented guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5) to the Human Rights Council in 2011.

19. As a better understanding of the links between gross human rights violations and sovereign financing is linked not only to the right to the truth but also to the prevention of abuses, intellectual exchanges with international financial institutions, private lenders, United Nations organs and civil society actors working on those issues will be encouraged.

F. Impact of illicit financial flows on the enjoyment of human rights

20. The Independent Expert was requested by the Human Rights Council in its resolution 25/9 to undertake an additional study on the effects of illicit financial flows in the context of the post-2015 development agenda of the United Nations. This follows an earlier request made by the Council to the previous mandate holder to submit an in-depth study on the impact of non-repatriation of funds of illicit origin on the enjoyment of human rights to the Council (see resolutions 19/38 and 22/12 and documents A/HRC/22/42 and Corr.1 and A/HRC/25/52).

21. In order to carry out the study, illicit financial flows need to be further defined and their volume, origins and destinations studied. In addition, as systematic approaches to address the problem will be needed, it is not sufficient to look at success on a case-by-case basis only; it is important to focus on the identification and systematization of human rights effects of non-repatriation of illicit funds, which reduce developing countries' resources and capacities to fulfil the civil, political, economic and social rights of citizens, and feed global poverty and inequalities. It is also necessary to pay attention to the causes and structural roots that facilitate and promote illicit financial flows in countries of origin and countries of destination of such flows. As a general principle, more transparency in financial markets, including more and better information and access to information, seems to be needed in order to design effective and/or improved instruments to prevent illicit financial flows and their negative human rights spillover effects. Related analytical work and the formulation of advice will be carried out by the Independent Expert.

22. In this context, the United Nations Convention against Corruption, as well as the development of international human rights law (including the debate about extraterritorial obligations) applicable to corporations, will be highly relevant to efforts to minimize illicit financial outflows. Collaboration with domestic and international organizations and entities working on these issues, including the Working Group on business and human rights, will be a priority.

23. For countries in transition, the repatriation of stolen assets poses an even greater challenge. Rectifying instances of corruption, embezzlement and cronyism can be crucial for the achievement of broad goals of transitional justice.

V. Working methods

A. Participation in international forums and in the post-2015 development agenda

24. The Independent Expert is eager to participate in international forums to highlight the importance of international human rights law for debt relief, debt restructuring, adjustment policies and tackling illicit financial flows. This includes

seeking to contribute to discussions carried out by Bretton Woods institutions, national and regional development banks, including the CAF Development Bank of Latin America, States and groups of States, such as the Group of 20, the Group of 24, the Group of 77, the group comprising Brazil, the Russian Federation, India, China and South Africa, including its recent decision to establish a new development bank,[3] the Paris Club, the Organization for Economic Cooperation and Development, United Nations agencies, national authorities, civil society organizations, the private sector and academia.

25. Engaging in genuine dialogue with other stakeholders will mutually improve the intellectual and political tools that each participant can leverage to address debt issues. In addition to human rights law, other parts of general public international law can potentially lend its universality in order to build and foster global consensus around those issues.

26. The Human Rights Council, in its resolutions 25/9 and 25/16, requested the Independent Expert to pay particular attention to the United Nations development goals and its post-2015 development framework. An active role in the international discussion on the post-2015 development agenda is therefore crucial. The Independent Expert will thus seek to add his voice to the discussions about the post-2015 development agenda and its implementation, focusing on the effect of sovereign debt on social, economic and cultural rights and the impact of illicit financial flows on countries' development. He is also eager to participate in the third International Conference on Financing for Development.

B. Enhancing dialogue with all stakeholders, including the private sector

27. In line with Human Rights Council resolution 25/16, in which the Council urged international organizations, international financial institutions, non-governmental organizations and the private sector to cooperate fully with the Independent Expert in the discharge of his or her mandate, all relevant stakeholders will be invited to participate in the work of the Independent Expert. Collaboration and consultation with civil society actors will continue to be a priority. Given the current composition of global sovereign debt, engaging the private sector in the work of the mandate holder is particularly desirable. The mandate holder will seek to contribute to strengthening good practices in relation to responsible lending by the private financial sector on the basis of the Guiding Principles on business and human rights (A/HRC/17/31, annex) and on foreign debt and human rights (A/HRC/20/23, annex). Taking into consideration the number of creditors that, on the one hand, actually accept debt restructuring proposals and, on the other, follow the instructions of the Security Council when imposing economic sanctions, it is submitted that lenders are, to a significant extent, aware of the political, if not legal, limits that international law imposes on proposals to resolve debt issues.

[3] See the Fortaleza Declaration and Action Plan and the Agreement on the New Development Bank, adopted at the sixth summit of Heads of State and Government of Brazil, China, India, the Russian Federation and South Africa, held on 14-16 July 2014. Available from http://brics6.itamaraty.gov.br.

28. Contributing through a pluralistic debate to create a clearer picture of how sovereign financing affects human rights may offer lenders a more compelling, sophisticated and complete set of data. Such data can be incorporated into their reasoning and financial decisions. They can then meet human rights standards without being exposed to major legal risks while enhancing political, economic and social conditions for sustainable growth and good businesses. Identifying responsible human rights practices in this field that may contribute to the stability of transactions, as well as improving transparency and predictability, would also be useful.

C. Country visits

29. Country visits and interactions with government officials at the national and local levels, national human rights institutions and civil society can serve as a means of assisting Governments in meeting their development goals, implementing international human rights standards, gathering information to better understand the details of each country's interactions between finance and human rights, generalizing lessons learned for future proposals, remedying abuses in the public interest and establishing the foundation of an effective civil society. They also offer an opportunity to identify good practices and learn more about how States have dealt with particular human rights challenges relating to the mandate.

D. Broad dissemination of information, advice and advocacy

30. Besides the information gathering and conceptual work to be done, the Independent Expert will seek effective ways to disseminate information about mandate-related work and ideas and encourage their discussion. This includes using the mandate holder's website, preparing working papers, submitting thematic reports to the Human Rights Council and the General Assembly and using other agencies' platforms.

31. The Independent Expert may submit advice covering specific cases or negotiations or present general and specific human rights opinions on debt management, debt relief and debt restructuring or the implementation of adjustment policies. If necessary, or requested, he may comment on draft laws and regulations or raise his concerns through other established working methods of special procedures, such as communications or public statements.

E. Concern for particular affected groups

32. The Independent Expert will continue to focus on the impact that debt and adjustment policies have on people living in poverty, women, children, persons with disabilities, indigenous people, migrants, minorities and others. He will analyse how foreign debt and related policy reforms affect members of society differently, in particular those belonging to marginalized groups, and continue to integrate a gender perspective in the work of the mandate holder (see the report of the previous Independent Expert contained in document A/67/304).

F. The need for empirical evidence, legal research and micro-macro considerations

33. In order to make international human rights standards more compelling, effective and enforceable, the Independent Expert will pay special attention to empirical data and causation in order to identify the negative impacts on human rights in financial contexts. Given the wide range of human rights positively and negatively affected by debt and the complexities posed by the links between debt and human rights, the study of each topic presented in the workplan will include a reflection on the specific human rights principles and norms implicated by those links, paying special attention to the Guiding Principles on foreign debt and human rights (A/HRC/20/23, annex).

34. Human rights law tends to take a microlevel approach to human rights violations, as human rights law is actor-oriented and fulfilling human rights obligations is about allocating responsibilities. The Independent Expert will integrate and complement this human rights microlevel causal link perspective with a macrolevel approach, carrying out holistic and interdisciplinary studies that consider the broad context and driving forces that shape sovereign debt and human rights. Without such analyses, financial behaviours that have a serious negative impact on populations would inevitably, and sadly, go unnoticed in human rights law discussions.

G. Collaboration with other human rights mechanisms and the Office of the United Nations High Commissioner for Human Rights

35. In discharging his mandate, the Independent Expert will collaborate with all relevant human rights mechanisms at the international, regional and national levels, including other special procedures established by the Human Rights Council, treaty bodies, such as the Committee on Economic, Social and Cultural Rights, and national human rights institutions.

36. The work of the Independent Expert is highly relevant to the thematic priority of the United Nations High Commissioner for Human Rights to integrate human rights in development and the economic sphere.[4] The work of the Independent Expert will aim to contribute to integrating international human rights principles and standards in finance and investment policies, including by exploring cooperation with the World Bank, the International Monetary Fund, regional development banks, pertinent United Nations agencies and organs and other relevant actors. As part of his work, he will advocate for the mobilization of maximum available resources to promote the progressive realization of all human rights, including through the employment of innovative forms of financing for development and the promotion of a human rights-based approach to fiscal policy and development assistance.

[4] See the OHCHR Management Plan 2014-2017, pp. 62-71. Available from www2.ohchr.org/english/ohchrreport2014_2017/omp_web_version/index.html#/home.

VI. Conclusions

37. **The workplan of the Independent Expert on the effects of foreign debt and human rights will focus on several issues that, despite their great importance, have received limited international attention from a human rights perspective. These include preventive measures to avoid debt crisis and associated negative human rights impacts; good practices in dealing with debt crisis to avoid retrogressive measures in the realization of economic and social rights; the role of human rights in debt restructurings; debt disputes in the context of bilateral investment treaties; lending to States and non-State actors involved in gross human rights violations; and the impact of illicit financial flows on the enjoyment of human rights.**

38. **The Independent Expert will promote human rights accountability and monitoring, including through guidance on human rights impact assessments to protect against and provide remedies for any negative human rights impacts of finance and investment policies, and promote and support the participation of rights holders in the design and monitoring of public policies, budgets and development projects, including austerity measures.**

39. **Part of his human rights mainstreaming activities will be devoted to helping to integrate human rights in relevant United Nations policies and programmes in the context of the post-2015 agenda framework currently under discussion.**

40. **He is convinced that putting human rights at the heart of development and financial policies not only is the right thing to do from a normative perspective but will also lead to much better and more sustainable results for economic, social and human development.**